

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EDWARD AVERY BROOKS, :

Plaintiff, :

-against- :

D.C. 9 PAINTERS UNION, :

Defendant. :

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KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

REPORT and RECOMMENDATION

10 Civ. 7800 (BSJ)(KNF)

TO THE HONORABLE BARBARA S. JONES, UNITED STATES DISTRICT JUDGE

On October 7, 2010, the plaintiff, proceeding pro se and in forma pauperis, commenced the instant employment discrimination action. On October 29, 2010, the Pro Se Office mailed, to the plaintiff, a Rule 4 Service Package, to enable him to effect service of process on the defendant. On February 16, 2011, upon the plaintiff's motion, the Court enlarged the time to effect service of process to March 31, 2011. On March 31, 2011, the Court again enlarged the plaintiff's time to effect service of process to April 29, 2011. The Court advised the plaintiff that failure to serve the defendant by April 29, 2011, would result in the issuance of a report, to the assigned district judge, recommending that his action be dismissed, pursuant to Fed. R. Civ. P. 4 and 41. As of the date of this report, the plaintiff has not filed proof of service with the Clerk of Court nor has he demonstrated good cause for his failure to serve process timely.

Fed. R. Civ. P. 4(m) provides, in relevant part, that "[i]f a defendant is not served within 120 days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice against that defendant or order that service be made within a specified time." On October 29, 2010, the Pro Se Office mailed, to the plaintiff, a Rule 4 Service Package, to enable him to effect service of process on the defendant. Thereafter, the Court twice

provided the plaintiff additional time to serve the defendant and, in its March 31, 2011 order, cautioned the plaintiff that failure to serve could result in dismissal of his action. The plaintiff has failed to serve the defendant within the time allotted by the Federal Rules of Civil Procedure and, later, by the Court, and has not demonstrated good cause for his failure, which would warrant further extensions. See Fed. R. Civ. P. 4(m). Hence, in accordance with the express language of Fed. R. Civ. P. 4(m), and in the exercise of the court's discretion, see Thompson v. Maldonado, 309 F.3d 107, 110 (2d Cir. 2002), it would be reasonable and appropriate to dismiss the plaintiff's complaint, without prejudice.

RECOMMENDATION

For the reasons set forth above, I recommend that the instant action be dismissed, without prejudice, pursuant to Fed. R. Civ. P. 4(m).


FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b)(2) of the Federal Rules of Civil Procedure, the plaintiff shall have fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections, and any responses to objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Barbara S. Jones, 500 Pearl Street, Room 1920, New York, New York 10007, and to the chambers of the undersigned, 40 Centre Street, Room 540, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Jones. FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. See Thomas v. Arn, 474 U.S. 140, 145, 106 S.Ct. 466, 470 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v.

Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair Ltd., 838 F.2d 55, 58-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983).

Dated: New York, New York
May 4, 2011

Respectfully submitted,



KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

Copy mailed to:

Edward Avery Brooks